Supreme Court, U.S.
FILED
JUN 12 2000
CLERK

No. 99-1758

IN THE

Supreme Court of the United States

DELAWARE RIVER PORT AUTHORITY,
Petitioner,

v.

FRATERNAL ORDER OF POLICE,
PENN-JERSEY LODGE 30, and JOSEPH VENA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF
NEW JERSEY,
APPELLATE DIVISION

REPLY BRIEF FOR PETITIONER

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Nothing in Respondents' brief in opposition detracts from the reasons why this Court should grant review, and the brief in opposition in many respects merely underscores why review is appropriate in this case.

1. Respondents admit, as they must, that the amendment provision of the Compact[1] requires "the action of either state *concurred in* by legislation of the other." (Resp. at 1) (emphasis added).[2] Respondents concede that "the interpretation of a compact 'presents a federal question,' " and that "all that is required by the courts [in determining whether certain laws apply to a compact entity] is '*some showing of agreement in the laws* involving and regulating [the] bi-state agency.' " (Resp. at 3, 4, 6).

2. This case centers on the meaning of the word "concurred" in the amendment provision of the Compact. The term "concur" is defined as "[t]o agree; accord; act together; consent." Black's Law Dictionary 291 (6th ed. 1990); *see also Settecase v. Port Auth. of New York & New Jersey,* 13 F. Supp. 2d 530 (S.D.N.Y. 1998) (as used in an interstate compact amendment provision, "[t]he term 'concur' is defined as 'to act together to a common end or single effect, . . . it implies bilateral action"). In *Settecase,* which involved a determination whether certain laws of the two compacting states (New Jer-

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1. Respondents' contention in their brief that "[t]he Compact . . . provides that legislation passed in one compact state shall become effective and applicable to the DRPA upon the 'passage . . . of a substantially similar act,' or 'the enactment of similar legislation,' or of 'legislation substantially similar' by the other compact state," (Resp. at 1-2, n.3), is inaccurate. The quoted language appears to be from West Publishing Company's "Historical and Statutory Notes" for the Pennsylvania and New Jersey annotated statutes, not from the Compact, as Respondents suggest. *Id.* Secondly, the quoted language follows only certain provisions of the Compact, and these provisions already contain *express reference or agreement* to apply to the Compact or the DRPA. Finally, the language quoted does not override the Compact's explicit amendment provision, which even Respondents elsewhere concede requires "the action of either state *concurred in* by legislation of the other." (Resp. at 1) (emphasis added).

2. Emphasis added throughout unless otherwise noted.

sey and New York) applied to *amicus* Port Authority of New York and New Jersey, the court required an express showing of "an intent to jointly act":

> According to those definitions [of concur], a state would not likely be said to have concurred in legislation by the other simply because it happened to enact legislation similar in language and effect. *Concurrence implies an intent to jointly act.*

Id. at 534.

Evidence of "an intent to jointly act" is precisely what is missing in New Jersey's Implied Amendment rule. To amend a compact which requires for a valid amendment "the action of either state *concurred in* by legislation of the other," two conditions must be satisfied under established compact jurisprudence: (1) express agreement in the compacting states' legislation indicating that the compact is to be amended by such legislation – *i.e.*, an "intent to jointly act"; *and* (2) legislation of the respective states that is nearly identical, if not identical. This simple, two-part standard is objective, easily applied, promotes predictable results, and squares with the terms of the compacts. It is the absence of the first condition that distinguishes New Jersey's permissive Implied Amendment rule.

New Jersey courts employ a standard that recognizes an amendment to a compact whenever legislation of the compacting states is "complementary or parallel" or "substantially similar." This standard may provide a satisfactory gloss on the second condition, the requirement that the companion legislation be "nearly identical," but fails to capture a requirement of fundamental constitutional dimension.

In short, in implying an amendment to the DRPA Compact that requires the DRPA to submit labor disputes to binding interest arbitration before a court-appointed arbitrator, the New Jersey court below ignored the first condition, and watered down the second. The constitutional error is particularly egregious in this case, where the effect of the "amendment" is improperly to cancel, override, and subordinate the power to fix employees' compensation, conferred on the DRPA Commissioners by express provisions of the Compact, a federal law.

I. A CLEAR CONFLICT EXISTS BETWEEN NEW JERSEY AND ITS NEIGHBORING STATES WITH RESPECT TO THE APPROPRIATE LEGAL STANDARD.

1. The Standard Applied In New Jersey Conflicts With The Standard Applied In New York.

Respondents seriously misread *Malverty v. Waterfront Comm'n*, 71 N.Y.2d 977, 524 N.E.2d 421, 529 N.Y.S.2d 67 (1988), but grudgingly concede that *Malverty* "displays displeasure" with New Jersey's Implied Amendment rule. (Resp. at 11). However, Respondents erroneously suggest that New York's "rejection of the doctrine of complementary legislation appears in *dicta* . . . ." (Resp. at 11).

The New York court's determination is not *dictum*. In *Malverty*, a former licensed dockworker sought a court order compelling the Waterfront Commission of New York Harbor ("Waterfront Commission") — an interstate compact entity formed between New York and New Jersey and one of the *amici* urging review in this case[3] — to restore him to a certain register. In support of that request, the former worker relied on New York legislation that prohibited discrimination against former inmates (such as Mr. Malverty) with respect to certain public employment opportunities. *Malverty*, 71 N.Y.2d at 979-80, 524 N.E.2d at 422, 529 N.Y.S.2d at 67-68. The question was whether this legislation applied to the Waterfront Commission. The legislation did not "refer[] to the Waterfront Commission." *Id.* at 980, 524 N.E.2d at 422, 529 N.Y.S.2d at 68. It contained no "express statement that the Legislature was amending or supplementing the provisions of the 'Compact.'" *Id.* Like the DRPA Compact in this case, the compact creating the Waterfront Commission also required legislation "concurred in by legislative action of the other State." *Id.*

3. Because of the threatened impact of the conflict between the New Jersey and New York courts on the Waterfront Commission and other New Jersey-related compact entities of the New Jersey's aberrant rule, the Waterfront Commission, in conjunction with the Port Authority of New York and New Jersey, has also filed a brief *amicus curiae* in this case urging this Court to grant review in this case.

Because of the lack of any basis for concluding that the first condition — agreement or intent to jointly act — was satisfied, the Court of Appeals of New York concluded that neither state had "concurred" in subjecting the Waterfront Commission to the legislation. *Id.* The court found it irrelevant that New Jersey had enacted "the same, or similar" legislation prohibiting discrimination against former inmates:

> That the two States have evinced the same, or similar, public policy regarding employment opportunities for former inmates by enacting similar 'antidiscrimination' laws is *not* sufficient under the express terms of the 'Compact' to render [the Compact] properly amended or supplemental such that the Commission would be subject to the provisions of [New York's antidiscrimination laws]."

Id. (citation to New Jersey statute omitted). *Malverty's* square holding on this point clearly belies Respondents' contention "that the decision below does not conflict with decisions of other state [courts]."

2. The Standard Applied In New Jersey Conflicts With The Standard Applied In Pennsylvania.

Respondents similarly misread *Nardi v. Delaware River Port Auth.*, 88 Pa. Commw. 558, 490 A.2d 949 (1985), as being consistent with the decision below. The Pennsylvania court held that the New Jersey and Pennsylvania statutes at issue — which were premised on the same public policy, *and which were even made specifically applicable to the DRPA* (thus satisfying the first condition) — could *not* be imposed on the DRPA. *Id.* at 565, 490 A.2d at 952. The Pennsylvania court reasoned that the difference between the word "*shall*," contained in the Pennsylvania act, and the word "*may*," contained in the corollary New Jersey act, was substantial enough for the laws to flunk the *second* condition for an effective amendment of a compact, *i.e.*, that the parallel legislation be identical or nearly identical.

Respondents' attempt to conflate the two conditions is evident from the fact that, in *Nardi*, both statutes *expressly provided* that the DRPA *was* subject to the legislation.

Respondents' contention that *Nardi* adopted New Jersey's Implied Amendment rule overlooks this fact. Any reference in *Nardi* to the "substantial similarity" test is limited to the second condition, *i.e.*, whether the legislation is identical or nearly identical.

The approaches of Pennsylvania and New Jersey courts could not be more sharply conflicting.

II. THE CONFLICT IS AGGRAVATED BY STATE-FEDERAL CONFLICTS, AS WELL AS STATE-STATE CONFLICTS.

Illustrating both the extent of the conflict and the frequent recurrence of the issue, the Second Circuit, in *Dezaio v. Port Auth. of New York & New Jersey,* 205 F.3d 62 (2d Cir. 2000), has very recently emphasized the necessity of the first condition of the legal standard for amending a compact — an intent to jointly act — thus tacitly rejecting New Jersey's rule. In dismissing the claim of a former employee of *amicus* Port Authority of New York and New Jersey under the New York Human Rights law on the ground that the law did not apply to the Port Authority, the Court stressed the absence of any indication that "either State legislature intended those laws [New York's and New Jersey's] to amend the provisions of the Compact":

> Nothing has been cited suggesting that New York's or New Jersey's anti-discrimination laws were *intended* to affect the internal operations of the Port Authority. That is, it does not appear that either State legislature *intended* those laws to amend the provisions of the Compact . . . 'bi-state entities created by compact . . . are not subject to the unilateral control of any one of the States that compose the federal system.'

Id. at 65 (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994)). Application of New Jersey's rule in that case would likely have been outcome-determinative the other way.

Respondents ignore, rather than even attempting to distinguish, *C. T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408 (D. Md. 1976), a case that clearly demonstrates the conflict between the New Jersey

Implied Amendment rule and the federal standard for interstate compact amendments applied in federal courts. *C.T. Hellmuth* involved the issue whether Maryland's Public Information Act (the "Act") applies to the Washington Metropolitan Area Transit Authority ("WMATA"), an interstate agency created pursuant to a compact between Virginia, Maryland, and the District of Columbia, and an *amicus* that has also filed a brief supporting review of the important issue involved in this case. The court refused to subject WMATA to the Act and followed the "settled" rule that "one party may not enact legislation which would impose burdens upon the compact *absent the concurrence* of the other signatories." *Id.* at 409. The plaintiff argued that this rule, requiring concurrence or agreement (the first condition), should not apply "where it is claimed the parties have equivalent legislation"[4] (the second condition). *Id.* In rejecting plaintiff's "equivalent legislation" argument (the argument endorsed by the New Jersey court below), the court pointed out that, "*[r]egardless of how similar the laws may be*, plainly Maryland may not impose its preferences . . . upon Virginia and the District, for such an imposition, however minimal, is nonetheless an intrusion upon their interests and in derogation of the compact." *Id.* at 410. The federal court further stated that the mere fact that Virginia and the District of Columbia have adopted such laws "*can hardly be taken as a tacit agreement on their part that WMATA should be governed by the Maryland law* . . ." Id. at 409-10.

Unlike the New Jersey court below, the district court completely rejected "*tacit agreement*" as a basis for "implying" an amendment to the WMATA compact.

Recently, another federal court has noted the "permissiveness" of New Jersey's Implied Amendment rule used in deciding whether certain laws apply to an interstate compact. *Pilla v. Delaware River Port Auth.*, 1999 WL 345918 (E.D. Pa. May 7, 1999). In rejecting the New Jersey rule, the court noted the conflict between the New Jersey standard and the standard used by federal courts:

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4. Virginia and the District of Columbia also had freedom of information laws.

> Plaintiff tries to salvage his claim by arguing for the more permissive 'substantial similarity' test applied by some New Jersey courts . . . However, *plaintiff can point to no federal court that has adopted New Jersey's more permissive view*, and this Court has not been persuaded to become the first.

Pilla, 1999 WL 345918, at 4.

As *C. T. Hellmuth* and *Pilla* make clear, there is a conflict between the standard used in the federal courts and the permissive standard used by the New Jersey courts.[5] *See also Port Auth. Trans-Hudson v. Feeney Corp.*, 495 U.S. 299, 314 (1990) (Brennan, J., concurring) (to "change the Port Authority's organization or powers, the legislatures of both States must pass a bill to that effect"); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States can be unilaterally nullified, or given final meaning by an organ of one of the contracting States").

Contrary to Respondents' suggestion that the New Jersey rule has only been rejected by one federal court, it has, in fact, been rejected by at least five: *Dezaio v. Port Auth. of New York & New Jersey*, 205 F.3d 62 (2d Cir. 2000); *Pilla v. Delaware River Port Auth.*, 1999 WL 345918 (E.D. Pa. May 7, 1999); *Settecase v. Port Auth. of New York & New Jersey*, 13 F. Supp. 2d 530 (S.D.N.Y. 1998); *C. T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth.*, 414 F. Supp. 408

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5. Respondents' reliance on *Moore v. Delaware River Port Auth.*, 80 F. Supp. 2d 264 (D.N.J. 1999) is misplaced. *Moore* involved the somewhat different question whether certain common law principles applied to the DRPA, not the question whether the compacting states' *legislation* applied. Respondents' reliance on *Redbird Engineering Sales, Inc. v. Bi-State Development Agency of Missouri-Illinois Metro. Dist.*, 806 S.W.2d 695 (Mo. App. Ct. 1991), again illustrates why this Court should grant review. Respondents suggest that *Redbird* adopted a "complementary or parallel" standard for amending the compact (a standard that does not require the first condition of the standard, intent to jointly act). *Redbird*, which somewhat parallels the decision below, merely suggests that the national conflict among the states on this important issue is even more extensive and therefore underscores the need for review.

(D. Md. 1976); *Rao v. Port of New York Auth.*, 122 F. Supp. 595 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 362 (2d Cir. 1955).

III. THE QUESTION IS AN IMPORTANT AND FREQUENTLY RECURRING ONE.

The question involved in this case is a frequently recurring one. As Respondents concede, this case again involves an issue similar to that raised in *International Union of Operating Eng'rs, Local 68 v. Delaware River & Bay Auth.*, 147 N.J. 433, 688 A.2d 569, *cert. denied*, 522 U.S. 861 (1997) ("Local 68"), presented just two terms ago.[6] (Resp. at 1). Over fifty interstate compacts, affecting all fifty states, have an amendment provision identical, or nearly identical, to the amendment provision in the DRPA Compact at issue in this case. (Pet. at 5-7, n.5). Similar questions arise with increasing frequency under many of them. Because of New Jersey's aberrant rule, other compact entities in which New Jersey is involved either have already encountered (as in the case of the DRPA and the DRBA), or can expect in the near future to encounter, the same problem with New Jersey's more "permissive standard." That four important interstate compact entities involving New Jersey as a partner — the Delaware River Port Authority, the Delaware River & Bay Authority, the Port Authority of New

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6. Because of the impact of the conflict between New Jersey and Delaware courts on the Delaware River and Bay Authority and other compact entities of the New Jersey court's decision in this case, the Delaware River and Bay Authority has also filed a brief *amicus curiae* in this case urging this Court to grant review.

Local 68 involved the different issue whether non-police employees of *amicus*, Delaware River and Bay Authority, a bi-state entity involving Delaware and New Jersey, had the right under those states' laws to designate a representative, and through that representative, *engage* in collective negotiations. The relief ordered in *Local 68* was dramatically different from the relief ordered in the decision below. The decision did not infringe upon the Bay Authority's right to set *wages* and working conditions for its employees (interest arbitration was not ordered). No terms and conditions of a contract were imposed. The issue in this case is whether a state court by implied amendment can *compel* a compact entity to ignore specific requirements of, and powers granted to the compact entity in, the compact that created the entity.

York and New Jersey, and the Waterfront Commission of New York Harbor – are before this Court urging review of the issue in this case (the second in as many terms) underscores the importance of the issue and the need for review.

IV. THE COURT SHOULD GRANT CERTIORARI TO ESTABLISH A UNIFORM FEDERAL STANDARD.

In a sweeping over-generalization, Respondents wrongly suggest that interstate compacts are ill-suited subjects for uniform interpretation, relying only on inapposite quotations extracted from opinions involving unrelated contexts. Although Respondents cite *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951), for this proposition, the cited passage involves, instead, the impracticality of formulating a code for *litigation* among the states. *Id.* The cited dissenting opinion in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959), dealt with sovereign immunity in interstate compact cases. The case turned on the interpretation of *a particular* compact clause that possibly waived such immunity, rather than the type of ubiquitous provision involved here. *Id.* The standard compact amendment provision involved in this case naturally calls for a uniform national resolution of this question of federal law.

New Jersey's Implied Amendment rule invites forum-shopping, creates uncertainty, and properly requires harmonization to avoid unnecessary, recurring friction among the states.[7]

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7. While conceding that the decision below was certified as "final" by the New Jersey courts (Resp. at 3), Respondents nonetheless erroneously contend that review should be denied because the order is "arguably interlocutory." Putting to one side this erroneous and self-contradictory characterization of the order as "interlocutory," Respondents mistakenly contend that review of a question of conceded public importance is inappropriate in such circumstances. This is incorrect. *See* R. Stern, E. Gressman, S. Shapiro, & K.Geller, *Supreme Court Practice* § 4.18 (7th ed. 1993). Indeed, this Court has granted review to even nonfinal orders where a lower court's decision was "clearly erroneous." *Mazurek v. Armstrong*, 520 U.S. 968 (1997). Moreover, nonfinal orders may also be reviewed "where the lower court's judg-

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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NOTES *(Continued)*

ment has produced *immediate consequences*" for the petitioning party. *Id.* (a case involving a *threat* of action by the lower court). Interlocutory decisions have been reviewed in other circumstances. *See United States v. General Motors Corp.*, 323 U.S. 373, 374 (1945) (granting certiorari to resolve a conflict among courts before a final judgment); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916) (same); *Forsyth v. Hammond*, 166 U.S. 506 (1897) (same); *American Constr. Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372 (1893) (granting certiorari where the nonfinal judgment presented a novel and important question, and where acceptance of petitioner's position would render the lower court's decision void). Similar circumstances are present in this case.

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